

at ____ O'clock & ____ min. ____ M

BRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina (37)

D. H. R.

² Further references to the Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, and to the Federal Rules of Bankruptcy Procedure shall be by section and rule number only.

29115. The following persons are also guarantors on this loan and have filed their own Chapter 7 bankruptcies: Navin S. Patel (Case Number 03-9856-jw) and Mahendra S. Patel (Case Number 03-9857-jw).

On September 9, 2003, the Clerk of Court issued a Notice to File Claims in the present case and in each of the two previously mentioned cases. The Notice set a deadline for filing proofs of claim of December 8, 2003. On October 22, 2003, Commercial submitted Proofs of Claim both in this case and in the Navin Patel case for \$1,495,591.24, which was the total amount owed on the loan guaranteed by the Debtors in each case. These two proofs of claim were mailed to the Bankruptcy Court in the same envelope. The Proof of Claims in both the Navin Patel bankruptcy and the Mahendra Patel bankruptcy were filed on October 27, 2003 and appear in the respective claims registers; the Bipinchandra Patel proof of claim does not appear in the claims register. A copy of the Bipinchandra Patel proof of claim dated October 22, 2003 is attached to this order as "Exhibit A."

Commercial did not receive filed copies of the two proofs of claim that appear in their respective claims registers. Commercial apparently did not become aware that its Proof of Claim in this case had not been filed until it was in the process of determining whether to pursue a deficiency judgment in the foreclosure against Shiva, Incorporated of Orangeburg. Upon determining that the Proof of Claim had not been filed in this bankruptcy, Commercial filed this motion to allow its proof of claim identical to the one that it earlier submitted for filing.

CONCLUSIONS OF LAW

Rule 3002(a) provides: “an unsecured creditor or an equity security holder must file a Proof of Claim or interest for the claim or interest to be allowed, except as provided in Rule 1019(3), 3003, 3004, and 3005.” Rule 3002(c) further provides: “In a Chapter 7 liquidation,...., a proof of claim is timely filed if it is filed not later than 90 days after the first date set for the meeting of creditors called under §341(a) if the Code, except as follows:

...(5) If notice of insufficient assets to pay a dividend was given to creditors pursuant to Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall notify the creditors of the fact and that they may file proofs of claim within 90 days after the mailing of that notice.”

In the present case, the §341 notice advised creditors that there did not appear to be assets available, and that creditors were not to file a proof of claim unless directed to do so. On September 9, 2003, the Court subsequently issued a Notice to File Proof of Claim or Interest, setting a deadline for filing proofs of claim by non-governmental entities of December 8, 2003.

The uncontradicted facts are that Commercial mailed proofs of claim for an identical amount in two separate cases on the same date in the same envelope. One of the proofs of claim, the Navin Patel Proof of Claim, was duly filed on October 27, 2003 and recorded in the claims register. The second, the Bipinchandra Patel Proof of Claim, was not.

The issue is whether the facts justify treating Commercial’s proof of claim in the present case as being timely filed though it was not actually filed by the Clerk of Court within the specified time period. Pursuant to Rule 5001, “[t]he court should be deemed always open for the purpose of filing any pleading or other proper paper, issuing and returning process, and filing, making, or entering motions, orders, and rules.” “Filing” has been held to consist of delivery to the Clerk of Court, including placement in the Court’s post office box. Torras Herreria

Constructionnes, S.A. v. M/V Timur Star, 803 F.2d 215, 216 (6th Cir. 1986). Receipt by the clerk of a pleading has been held to constitute “filing” despite the clerk’s failure to actually file it.

Hernandez v. Aldridge, 902 F.2d 386, 387-388 (5th Cir. 1990) (“...because an appellant has no control over delays between receipt and filing, a notice of appeal is timely filed if received by the district court within the applicable period.”)

In In re Pasco, 97-04421-W, Adv. Pro. No. 97-80289-W (Bkrtcy, D.S.C. 4/20/98), the Plaintiff’s complaint to determine the dischargeability of a debt was placed in United States Mail, first class postage prepaid, addressed to the United States Bankruptcy Court at its post office box in Columbia, South Carolina on the same date bankruptcy counsel mailed a voluntary petition in an unrelated case, similarly addressed, with the first class postage prepaid. The Plaintiff’s complaint was file-stamped by the Office of the Clerk of the Bankruptcy Court one day after the “bar date” for filing such complaints. The unrelated petition mailed at the same time was file-stamped two days earlier. From these facts, this Court inferred that the complaint was in the Clerk’s post office box before the deadline expired and was therefore constructively timely filed.

Pasco at 7.

In the present case, two proofs of claim were mailed at the same time in the same envelope. One was filed by the Clerk of Court. One was not. The proofs of claim were for the identical amount and the respective debtors have the same last name. Therefore, it is reasonable to infer that Commercial’s proof of claim in this case was received by the Clerk of Court in a timely manner, at the same time the Navin Patel proof of claim was received.

Therefore, the Court concludes that the proof of claim was “constructively filed” on October 27, 2003, and the proof of claim should be treated as timely for all purposes. In reaching this conclusion it is to be noted that the “...the bankruptcy court is guided by the principles of

equity, and that the court will act to assure that ‘...substance will not give way to form, that technical considerations will not prevent substantial justice to be done.’” In re International Horizons, Inc., 751 F.2d 1213, 1216 (11th Cir. 1985).

For these reasons, the Court orders that the proof of claim attached hereto as “Exhibit A” be treated as being constructively filed on October 27, 2003 and should be separately noted on the claims register.

IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina

June 7, 2004

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF <u>South Carolina</u>		PROOF OF CLAIM
Name of Debtor <u>Bipin chandray S. Patel</u> <u>AKA Bipin Patel</u>		Case Number: <u>03-09861-JW</u>
This form should not be used to make a claim for an administrative expense claim after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 502.		
Name of Creditor (The person or other entity to whom the debtor owes money or property): <u>Newtek Small Business Finance Inc.</u>		<div style="border: 1px solid black; padding: 5px;"> <input type="checkbox"/> Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars. <input checked="" type="checkbox"/> Check box if you have never received any notices from the bankruptcy court in this case. <input type="checkbox"/> Check box if the address differs from the address on the envelope sent to you by the court. </div>
Name and address where notices should be sent: <u>Newtek Small Business Finance Inc.</u> <u>4627th Ave, 14th Fl.</u> <u>New York, NY 10018</u>		
Telephone number: <u>212-356-9510</u>		
Account or other number by which creditor identifies debtor: <u>1610-99</u>		Check here <input type="checkbox"/> replaces if this claim a previously filed claim, dated: _____ <input type="checkbox"/> amends
1. Basis for Claim: <input type="checkbox"/> Goods sold <input type="checkbox"/> Services performed <input checked="" type="checkbox"/> Money loaned <input type="checkbox"/> Personal injury/wrongful death <input type="checkbox"/> Taxes <input type="checkbox"/> Other - _____		
<input type="checkbox"/> Retiree benefits as defined in 11 U.S.C. § 1114(a) <input type="checkbox"/> Wages, Salaries and compensation (Fill out below) Your SS #: _____ Unpaid compensation for services performed From _____ to _____ (date) (date)		
2. Date debt was incurred: <u>10/5/99</u>		3. If court judgment, date obtained: _____
4. Total Amount of Claim at Time Case Filed: <u>\$ 1,495,591.24</u> If all or part of your claim is secured or entitled to priority, also complete Item 5 or 6 below. <input checked="" type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.		
5. Secured Claim. <input checked="" type="checkbox"/> Check this box if your claim is secured by collateral (including a right to setoff). Brief Description of Collateral: <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input checked="" type="checkbox"/> Other <u>UCC's</u> Value of Collateral \$ to be determined <u>New Appraisal ordered</u> Amount of arrearage and other charges at time case filed included in secured claim above, if any: <u>\$ 39,311.06</u>		6. Unsecured Priority Claim. <input type="checkbox"/> Check this box if you have an unsecured priority claim. Amount entitled to priority \$ _____ Specify the priority of the claim: <input type="checkbox"/> Wages, salaries, or commissions (up to \$4,000), *earned within 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(3). <input type="checkbox"/> Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(4). <input type="checkbox"/> Up to \$1,800* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(A)(6). <input type="checkbox"/> Alimony, maintenance, or support owed to a spouse, former spouse, or child - 11 U.S.C. § 507(a)(7). <input type="checkbox"/> Taxes or penalties of governmental units - 11 U.S.C. § 507(a)(8). <input type="checkbox"/> Other - Specify applicable paragraph of 11 U.S.C. § 507(a). <small>*Amount are subject to adjustment on 4/1/98 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.</small>
7. Credits: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim. 8. Supporting Documents: Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are voluminous, attach a summary. 9. Date-Stamped Copy: To receive an acknowledgment of the filing of your claim, enclosed a stamped, self-addressed envelope and copy of this proof of claim.		This Space is for Court Use Only
Date <u>10/22/2003</u>	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach power of attorney, if any) Commercial Capital Corporation <u>Jonathan Hatten</u> By: [Corporate Officer's Name, Title]	
Penalty for presenting fraudulent claim: Fine up to \$50,000 or imprisonment up to 5 years, or both. 18 U.S.C. §§ 152 and 3571. 18306		